STATE OF COLORADO

DEPARTMENT OF REVENUE

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Bill Ritter, Jr. Governor

Roxanne Huber Executive Director

GIL-2009-008

March 17, 2009

Re: Taxability of consulting services and product sales

Dear XXXXXXXXXXX,

We will initially treat your request as one for a general information letter. You may resubmit this request for a private letter ruling.

Issue

- 1. Are consulting services subject to sales tax in Colorado?
- 2. Are the sales of products subject to sales or use tax?
- 3. Is the Company subject to Colorado income tax?
- 4. Is the Company subject to any other business taxes?

Background

You provide the following information. The company, which is a single member LLC, provides medical physics services to hospitals and diagnostic imaging centers throughout the United States and abroad. The company employs a team of medical physicists who visit these facilities and perform equipment testing and technical consulting, typically for one to

two days at a time. You anticipate providing services in Colorado for between one and thirty days per calendar year. The company and all of the physicists are based in XXXXXXXXX [another state] and you do not maintain a mailing address, office or any other property in Colorado. The physicists fly in for each appointment; all of the company's employees reside in XXXXX [another state]. You do not maintain a sales force of any kind, either in XXXXXX [another state] or any other location. Your visits are exclusively to provide services and a portion of the services are actually performed in XXXXXX [another state], because report writing, research, and other activities would be performed in XXXXXX [another state]instead of at the client site.

The company does not typically sell products. However, customers may occasionally purchase a physics-related product through the company because the company receives discounts from some product companies. The company resells these items and marks them up, but the company does not manufacture any products. The products the company resells would typically be in the \$XXXXX to \$XXXXX range and the company may sell none or a few in Colorado. Those products would typically be shipped from either XXXXXXX [another state] or directly from the manufacturer in another state.

Discussion

Sales Tax

Colorado imposes sales and use tax on the sale, use, storage, and consumption of tangible personal property. Although Colorado levies sales and use tax on certain services, none of these taxable services appear to be the services your company provides. See, §39-26-104, C.R.S.

An out-of-state retailer may have the obligation to collect sales or use tax for goods sold, used, stored, or consumed in Colorado if the retailer is "doing business" in Colorado. "Doing business in this state" is defined (§39-26-102(3), C.R.S.) to include the following activities:

- (3) "Doing business in this state" means the selling, leasing, or delivering in this state, or any activity in this state in connection with the selling, leasing, or delivering in this state, of tangible personal property by a retail sale as defined in this section, for use, storage, distribution, or consumption within this state. This term includes, but shall not be limited to, the following acts or methods of transacting business:
- (a) The maintaining within this state, directly or indirectly or by a subsidiary, of an office, distributing house, salesroom or house, warehouse, or other place of business;
- (b) The soliciting, either by direct representatives, indirect representatives, manufacturers' agents, or by distribution of catalogues or other advertising, or by use of any communication media, or by use of the newspaper, radio, or television advertising media, or by any other means whatsoever, of business from persons residing in this state and by reason thereof receiving orders from, or selling or leasing tangible personal property to, such persons residing in this state for use, consumption, distribution, and storage for use or consumption in this state.

A number of federal court cases have limited the right of a state to impose on the retailer the obligation to collect state sales and use taxes. *Complete Auto Transit, Inc. v. Brady*, 430

U.S. 274 (1977). In general, these cases require that the retailer have nexus with Colorado. In order to have nexus in Colorado, a retailer must have a some minimal physical presence in the state, either directly in the form of employees or property, or indirectly through agents, and engage in regular, purposeful in-state sales activities specifically directed at in-state customers.

You should be aware that other activity of a retailer that is unrelated to the sale of goods (e.g., employees providing services related or unrelated to the sale of goods) in a state will create nexus with the state for sales and use tax collection purposes. See, *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 97 S. Ct. 1386, 51 L.Ed.2d 631 (1977). For more information about this issue, see department publication FYI Sales 5 (sales tax information for out-of-state businesses).

For more information about this issue, see department publication FYI Sales 5 (sales tax information for out-of-state businesses). Issues of nexus and whether a retailer's conduct will create nexus for purposes of sales and use tax collection is generally a fact-intensive determination. The department does not provide in a general information letter a determination with respect to a specific set of facts. You may request a private letter ruling for a determination regarding these issues.

When a retailer purchases goods from a supplier and resells the goods to the ultimate consumer, the retailer may purchase the goods without incurring tax, but must collect sales tax when the goods are resold to the consumer. The tax is calculated on the purchase price charged the consumer, and includes any mark-up charged by the retailer. See, generally, §§39-26-104(1)(a), 102(12), C.R.S.

I note that most of your company's sales are to hospitals and laboratories. As is true for most states, sales of goods to charities (generally, entities holding a 501(c)(3) certificate from the IRS) and to governmental agencies (e.g., county hospitals) are exempt from sales and use tax. See, FYI Sales 1 (relating to sales to tax exempt entities). Also, certain medical supplies, therapeutic devices, and prosthetics are exempt from tax. See, FYI Sales 62 for more information about these items.

You ask for the applicable sales tax rate. Colorado has a state sales / use tax rate of 2.9%. There are a number of special districts and home-rule cities and counties that levy sales and use taxes. There are also a number of other cities and counties that levy sales, but not use, taxes. The department offers a number of resources regarding these state and local sales and use taxes, including on-line systems for finding tax rates and filing zero returns. See, e.g., Department publication (DRP) 1002 (which lists all taxing jurisdictions and their rates); FYI Sales 5 (Sales Tax Information for Out-of-state Businesses); FYI Sales 9 (licensing and reporting requirements); FYI Sales 62 (requirements for collecting local sales taxes). These and other publications can be found on the Department's web site at: www.colorado.gov/revenue/tax.

Income Tax

Colorado levies income tax on nonresident individuals who earn income from sources within Colorado. §39-22-109, C.R.S. Colorado will disregard a single-member limited liability company and levy income tax on the member. A taxpayer whose activities in Colorado exceed the mere solicitation of sales will have nexus with Colorado for income tax purposes. See, e.g., Department Reg. (39)22-301.1 (Doing business in Colorado).

Moreover, a taxpayer who has employees (resident or nonresident) who earn income from sources within Colorado is subject to Colorado's wage withholding requirements. Department Regulation (39)22-604.3.

There are apportionment rules relating to the income tax liability of nonresidents. See, generally, FYI Income 6 (income of nonresidents) and 17 (credit for taxes paid another state)

The Department offers a number of income tax resources for taxpayers. These are available on our web site mentioned above. We encourage you to take a moment to visit our web site.

Miscellaneous

Pursuant to state law and department regulation 24-35-103.5, the Department will make public a redacted version of this letter. Your letter requesting this general information letter is not made public. I enclose a proposed redacted version of this letter. Please contact me within 60 days from the date of this letter if you have any questions, comments, or objection concerning the redacted letter.

We hope this is helpful. As noted earlier, you may request a private letter ruling which will provide a determination regarding your specific circumstances.

Sincerely,

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